Supreme Court, U.S.
FILED

No. 931437 MAR - 9 1994

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1993

GILFORD PARTNERS,
Petitioner,

vs.

RICHARD PIZITZ et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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37 pp

QUESTION PRESENTED FOR REVIEW

Whether the Alabama courts' exercise of personal jurisdiction over non-resident Gilford Partners violated the Due Process Clause where jurisdiction was predicated solely upon the legal fiction that Gilford Partners' sale of a security, which in fact occurred in Illinois, was statutorily "deemed" to have occurred in Alabama.

CERTIFICATE OF INTERESTED PARTIES

Counsel of record for Petitioner, Gilford Partners, in accordance with Rule 29.1 of the Rules of the Supreme Court of the United States, effective January 1, 1990, certifies that the following parties have an interest in the outcome of this case.

1. The Honorable Arthur J. Hanes, Jr., Judge, the Circuit Court of Jefferson County, Alabama.
2. Gilford Partners, Petitioner.
3. Holmes-Gilbrooke General Partners, H. Robert Holmes, and Gilbrooke Associates, Inc.
4. Larry B. Childs, attorney with the firm of Walston, Stabler, Wells, Anderson & Bains, for Petitioner, Gilford Partners.
5. Samuel M. Hill, attorney with the firm of Walston, Stabler, Wells, Anderson & Bains, for Petitioner, Gilford Partners.
6. Richard Pizitz, Respondent.
7. Richard Pizitz, Jr., Respondent.
8. Merritt L. Pizitz, Respondent.
9. Jill Pizitz, Respondent.
10. Susan Pizitz Bosshard, Respondent.
11. Lee H. Zell, attorney with the firm of Berkowitz, Lefkovits, Isom & Kushner, for Respondents, Richard Pizitz, Richard Pizitz, Jr., Merritt L. Pizitz, Jill Pizitz, and Susan Pizitz Bosshard.
12. Susan S. Wagner, attorney with the firm of Berkowitz, Lefkovits, Isom & Kushner, for Respondents, Richard Pizitz, Richard Pizitz, Jr., Merritt L. Pizitz, Jill Pizitz, and Susan Pizitz Bosshard.

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No. _____

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GILFORD PARTNERS,

Petitioner,

vs.

RICHARD PIZITZ et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioner Gilford Partners, an Illinois limited partnership ("Gilford"), prays that this Court issue a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is Appendix A to this petition. The decision of the Circuit Court of Jefferson County is Appendix B.

JURISDICTION

The judgment of the Alabama Supreme Court was entered on November 5, 1993. The Alabama Supreme Court denied rehearing on December 10, 1993. This petition for certiorari was timely filed and this Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

The Code of Alabama § 8-6-12(c) and (d) (1975) provides in part:

§ 8-6-12. Registration of securities — Applicability of provisions of article; consent to service of process on secretary of state.

(c) An offer to sell or buy is made in this state, whether or not either party is then present in this state, when the offer;

(1) originates from this state, or

(2) is directed by the offeror to this state and received at the place to which it is directed (or at any post office in this state in the case of a mailed offer).

(d) An offer to buy or sell is accepted in this state when acceptance

(1) is communicated to the offeror in this state, and

(2) has not previously been communicated to the offeror, orally or in writing, outside this state; and acceptance is communicated to the offeror in this state, whether or not either party is then present in this state, when the offeree directs it to the offeror in this state reasonably believing

the offeror to be in this state and it is received at the place to which it is directed (or at any post office in this state in the case of a mailed acceptance).

* * *

Alabama Rule of Civil Procedure 4.2(a)(2)(C) provides:

RULE 4.2 PROCESS: BASIS FOR AND METHODS OF OUT-OF-STATE SERVICE.

(a) Basis for Out-of-state Service.

(2) Sufficient Contacts. A person has sufficient contacts with the state when that person, acting directly or by agent, is or may be legally responsible as a consequence of that person's

(C) causing tortious injury or damage by an act or omission in this state including but not limited to actions arising out of the ownership, operation or use of a motor vehicle, aircraft, boat or water-craft in this state.

* * *

INTRODUCTION AND STATEMENT OF THE CASE

The Alabama courts asserted jurisdiction over non-resident Gilford based purely on a legal fiction. The trial court and the Supreme Court of Alabama, construing § 8-6-12 ALA. CODE (1975), held that a security, which was actually sold in Illinois, was "deemed" to have been sold in Alabama. The courts below reasoned that the Alabama long-arm statute[1] reached Gilford, because in selling an unregistered security

[1] *See*, Rule 4.2(a)(2)(C) Ala.R.Civ.P.

Gilford "cause[d] tortious injury," which "under §§ 8-6-11 and 8-6-12 occurred in Alabama." (Appendix A at A-4.)[2]

This action began when the Pizitz Family Investment Partnership IX ("Pizitz Partnership") filed suit in the Circuit Court of Jefferson County, Alabama, alleging that Gilford had violated the Alabama Securities Act. The members of the Pizitz Partnership were residents of Alabama, California and Alaska. Gilford raised the personal jurisdiction issue in a motion to dismiss filed on December 2, 1991. Gilford argued in the motion to dismiss that the assertion of jurisdiction would violate due process. The trial court denied the motion to dismiss and the state supreme court affirmed.

In order to assert jurisdiction, the Alabama courts were forced to rely on Gilford's fictional minimal contacts with the forum. The record demonstrates that Gilford did not advertise or solicit business in the forum, maintain property or bank accounts, employ personnel or agents, or sell goods or services in the forum. (*See* Affidavit of Mitchell P. Kopin filed with Motion to Dismiss, ¶¶ 7-15; hereafter "Kopin Aff.") It is undisputed that Gilford did not solicit the sale involved in this action. (*See* Affidavit of Robert Holmes filed with Motion to Dismiss, ¶¶ 6-13; hereafter "Holmes Aff.") The Pizitz Partnership initially contacted Gilford requesting information and a subscription agreement. (Holmes Aff., ¶ 6.) Gilford provided the requested materials and later accepted the Pizitz Partnership's completed subscription agreement in Chicago, executed it in Chicago and returned a copy to the

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[2] Section 8-6-12(c) provides that an offer to buy or sell securities is *made* "in this state, whether or not either party is then present in this state, when the offer (1) originates from this state, or (2) is directed by the offeror to this state." Section 8-6-12(d) provides that an offer to buy or sell securities is *accepted* "in this state when acceptance (1) is communicated to the offeror in this state, and (2) has not been previously communicated to the offeror outside this state." Because Gilford forwarded a copy of an accepted subscription agreement to the Pizitz Partnership in Alabama, the Court held, pursuant to the statute, that the sale was "*deemed* to have occurred in Alabama." (Appendix A at A-4.)

Pizitz Partnership. *Id.*[3] In fact, Gilford's "deemed" contact with the forum was caused by the Pizitz Partnership seeking to purchase the security at issue in this case. (*See* Holmes Aff., ¶¶ 6-13.)

The Alabama Supreme Court denied Gilford's timely application for rehearing on December 10, 1993.

REASONS FOR GRANTING THE WRIT

The decision below merits this Court's review because Alabama's assertion of jurisdiction over Gilford based solely upon a statutorily "deemed" presence of Gilford in the forum violates due process. By expanding jurisdiction by means of a legal fiction, the Alabama courts have disrupted the certainty established by this Court's explanation of due process and have destroyed uniformity in the application of the due process clause in the several states. The Alabama court's precedent in this case creates a serious challenge to the fundamental principle that the Constitutional rights of non-resident defendants must remain uniform from state to state.

I. ALABAMA'S EXERCISE OF PERSONAL JURISDICTION OVER GILFORD CANNOT CONSTITUTIONALLY BE PREDICATED ON A FICTIONAL SALE OF A SINGLE SECURITY IN THE FORUM.

Since *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), "the 'Constitutional touchstone' to determine whether an exercise of personal jurisdiction comports with due process 'remains whether the defendant purposefully established minimum contacts in the forum state.'" *Asahi Metal Ind. Co. v. Superior Court of California, Solano County*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92

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[3] Under common law principles, the sale to the Pizitz Partnership occurred in Illinois. *J. R. Watkins Co.* v. *Hill*, 108 So. 244 (Ala. 1926); *Genesco Emp. Credit Association* v. *Cobb*, 411 So. 2d 151 (Ala. Civ. App. 1982); and 17A C.J.S. *Contracts* § 356 (1963). ("[A] contract is considered as entered into at the place where the offer is accepted.")

(1987), *quoting, Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985). Significantly, even if the defendant has purposefully engaged in forum activities, minimum requirements inherent in the concept of "fair play and substantial justice" may defeat the reasonableness of jurisdiction. *Burger King*, 471 U.S. at 478, 105 S.Ct. at 2185.[4] In this case, the minimum contacts test is not satisfied by the fiction that the security sale occurred "in this state."[5]

The decision below directly conflicts with the letter and spirit of this Court's decisions.

i.

Jurisdiction is properly asserted if the contacts with the forum "result from actions by the defendant *himself* that create a 'substantial connection' with the forum state." *Asahi Metal Ind. Co. v. Superior Court of California, Solano County*, 480 U.S. 102, 109, 107 S.Ct. 1026, 1030, 94 L.Ed. 2d 92 (1987) (emphasis in original). This substantial connection between the defendant and the forum state "must come about by *an action of the defendant purposefully directed toward the forum state.*" *Asahi* 480 U.S. 112, 107 S.Ct. 1032 (emphasis in original.)

More specifically, this Court has held that the actual execution of an agreement in the forum state, alone, is constitutionally insufficient to support the exercise of personal jurisdiction. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478,

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[4] Fairness in the assertion of jurisdiction is as significant as the necessity that the defendant have at least a minimal tie to the forum. *Hoffman v. United Telecommunications, Inc.*, 575 F. Suppl. 1463, 1469 (D. Kan. 1983) and 2 Moore, *Federal Practice*, ¶ 4.25[5] at 1171-73 (2d ed. 1977).

[5] We also note that the assertion of jurisdiction over Gilford offends traditional notions of fair play and substantial justice. The Alabama courts have referred to no other act by Gilford, apart from the "deemed" sale of a single security, as a predicate to assert jurisdiction. If Alabama is permitted statutorily to create the only act by which jurisdiction is accomplished, the nonresident's liberty interest in not being subject to the binding judgments of a forum with which it has no meaningful "contacts, ties or relations" is emasculated. *Burger King*, 471 U.S. at 471; 105 S.Ct. at 2181.

105 S.Ct. 2174, 2185, 85 L.Ed.2d 528 (1985), this Court unambiguously wrote:

> If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer is clearly that it cannot. (emphasis in original.)

The determination of personal jurisdiction does not turn on the application of mechanical tests; rather, this Court applies a "highly realistic" approach which recognizes that the contract has consequences that must be evaluated to determine if the defendant purposefully established minimum contacts with the forum. 471 U.S. at 479.

The analysis in *Burger King*, suggesting that the mere consummation of an agreement in the forum is insufficient to confer jurisdiction, applies with particular force when the agreement at issue — the defendant's only contact with the state — was actually made outside the forum and is brought within the forum only by operation of a legal fiction. The decision below, by predicating jurisdiction purely on a "deemed" presence, contradicts this Court's holding in *Burger King*.

ii.

This Court has made clear that a state cannot by legislative fiat manufacture the presence of non-resident defendants to satisfy the minimum contacts test. In *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed. 2d 683 (1977), the defendants, non-resident corporate directors, owned stock which was "deemed" to be located in the forum by operation of a Delaware statute.[6] None of the stock certificates were physically present in the forum. 433 U.S. at 192; 97 S.Ct. at 2573.

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[6]The Delaware statute stated: "for * * * purposes of * * * jurisdiction * * * the situs of the ownership of the capital stock of all corporations existing under the laws of this state * * * shall be regarded as in this state." 433 U.S. at 193, n.9, 97 S.Ct. at 2573 n.9.

Delaware legislated the location of the certificates because sequestration of the property allowed the state to assert *quasi in rem* jurisdiction and force the personal appearance of the owners. *Id.*[7]

The exercise of *quasi in rem* jurisdiction in *Shaffer* was predicated "solely on the statutory presence of appellants' property in Delaware." 433 U.S. at 211, 97 S.Ct. at 2584. This Court held that the *International Shoe* minimum contacts test must be applied to govern "all assertions of state courts' jurisdiction." *Id.* The fictional assignment of the situs of the stock certificates did not satisfy the minimum contacts test.

The Alabama Supreme Court has applied the Alabama Securities Act to achieve the same result created by the Delaware sequestration statute struck down by this Court in *Shaffer*. The fictional presence relied upon by the Alabama courts in this case should also be rejected.

Significantly, the decision below further contravenes this Court's decision in *Shaffer*. The Alabama courts entirely avoided the minimum contacts analysis by mechanically applying the choice of law provisions to establish *jurisdiction*. In *Shaffer*, this Court specifically stated that while it may be appropriate for the forum state's law to govern the obligations of the parties, this does not mean that non-resident defendants have "purposefully availed themselves" of the privilege of conducting business in the forum state so as to permit the exercise of jurisdiction. 433 U.S. at 215-216, 97 S.Ct. at 2586-87. *See also, Hanson v. Denckla*, 357 U.S. 235, 254, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). By relying on choice of law provisions as the predicate for asserting jurisdiction, the Alabama Supreme Court has radically expanded the law of personal jurisdiction.

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[7]The Delaware court pointed out that the purpose of sequestration was not to secure possession of property in dispute between debtors and creditors, rather "sequestration is a process used to compel the personal appearance of a nonresident defendant to answer and defend." 433 U.S at 193; 97 S.Ct. at 2574.

The decision below cannot be reconciled with this Court's decisions requiring minimum contacts between the forum and the non-resident defendant. This Court has specifically directed that lower courts focus upon the conduct of the non-resident defendant to determine if *that defendant* has created a substantial connection with the forum state. The court below did not follow this Court's oft-repeated directions. The court below focused on the conduct of the plaintiff and the legislative conduct of the forum itself. Applying the proper test, it is apparent that Gilford did not purposefully direct activity toward Alabama.

II. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DECISIONS OF FEDERAL APPELLATE COURTS AND OTHER STATE COURTS.

Alabama's assertion of jurisdiction over Gilford stands in stark contrast to rulings made in the federal courts of appeal and state appellate courts addressing the same issue. Prior to the decision below, federal and state courts consistently applied the due process clause to require more than a fictional presence to support jurisdiction. The decision below shatters that consistency and predicates jurisdiction on a "deemed" presence. The enjoyment of federal due process rights cannot depend upon the forum in which a non-resident defendant is sued; rather, those rights must be uniformly and consistently upheld in every state.

i.

The decision below conflicts with several decisions from the federal circuit courts. In *Erlanger Mills v. Cohoes Fibre Mills*, 339 F.2d 502, 507 (4th Cir. 1956), the Fourth Circuit held that a North Carolina federal court lacked personal jurisdiction over a New York defendant in a contract performance dispute. A single order for goods was submitted by the North Carolina plaintiff and accepted in New York by the defendant. The New York defendant had not conducted any other business in North Carolina. The Court of Appeals specifically held that the sale, even if tortious, would not support per-

sonal jurisdiction. *See also, Jonnet v. Dollar Savings Bank of the City of New York*, 530 F.2d 1123, 1139 (3rd Cir. 1976) (Gibbons, J. concurring) ("The question is whether the due process clause is satisfied when a fictional situs is substituted for minimum contacts analysis as a basis for exercising raw judicial power. I think it is plain that due process is not satisfied under such circumstances.") (cited with approval in *Shaffer*, 433 U.S. at 205.)

Similarly, in *Sea Lift, Inc. v. Refinadora Costarricense*, 792 F.2d 989, 993 (11th Cir. 1986), the Eleventh Circuit held that a single meeting between the non-resident defendant's agents in the forum and the signing of a single boilerplate contract in the forum was insufficient to support specific jurisdiction over a breach of contract claim. The court expressly held that the execution of a form contract in the forum was insufficient to confer jurisdiction. The decision below cannot be reconciled with *Sea Lift*. Because Alabama is located within the Eleventh Circuit, identical jurisdictional issues in Alabama could be resolved differently depending upon whether the non-resident defendant is sued in federal or state court.

ii.

The decision below conflicts with other state court decisions addressing the same issue.[8] *See e.g., Gordon v. Tow*, 148 Ill. App. 3d 275, 498 N.E.2d 718 (Ill. App. Ct. 1986). On their facts, *Gordon* and the present case are virtually identical. Tow, a Rhode Island resident, sold a limited partnership interest to Gordon, an Illinois resident. Gordon called Rhode Island to purchase the interest from Tow. Tow did not solicit or communicate with Gordon prior to this call. Tow sent a prospectus and a subscription to Gordon at Gordon's request. Gordon completed the subscription agreement and forwarded it with $20,000 to Tow to purchase the interest.

The Illinois Appellate Court in *Gordon* affirmed the trial court's dismissal of the complaint for lack of personal juris-

[8] The split in state law authorities alone constitutes a valid ground for review by this Court, *St. Martin Lutheran Church* v. *South Dakota*, 451 U.S. 772, 780, n.10 (1981).

diction over non-resident defendant Tow. The court explained that Gordon had initiated the transaction outside of Illinois, the agreement was entered into outside of Illinois, and the contract was to be performed outside of Illinois. As a result, the court concluded that Tow had not conducted any business "within this state." 148 Ill. App. 3d at 278, 498 N.E.2d at 720. Moreover, the court concluded that based on these facts, Tow had not purposely availed himself of the privilege of conducting business in Illinois such that he invoked the benefits and protections of the laws of Illinois.[9] The Illinois Court refused to permit Gordon to "lure the non-resident defendant into Illinois." 148 Ill. App. 3d at 280, 498 N.E.2d at 721.[10]

The decision below cannot be reconciled with *Erlanger Mills*, *Sea Lift*, *Jonnet* or *Gordon*. As a result, the reach of long-arm jurisdiction is broader in Alabama than elsewhere. The *Erlanger Mills* court explained the significance of such a result:

> If one State may, without violation of the due process clause, extend the authority of its courts beyond its boundaries over persons and situations not sufficiently related to that State, the separate identity of the States will be reduced to a mere fiction.

239 F.2d at 509.

The decision below is not merely an erroneous application of law to facts. It is a significant and unjustified expansion of one state's jurisdictional reach. That expansion undermines

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[9] *Gordon* specifically rejected the argument that limited telephone contacts and exchanges of correspondence supported the assertion of jurisdiction. 148 Ill. App. 3d at 283, 498 N.E.2d at 723.

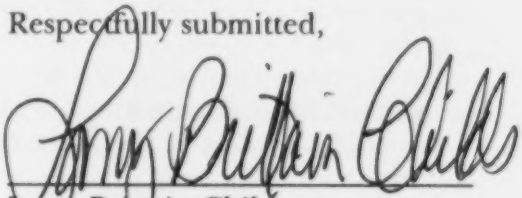
[10] Ironically, the only case cited by the Alabama courts in support of asserting jurisdiction over Gilford was an Illinois federal district court opinion–*Florendo v. Pan Hemisphere Transport, Inc.*, 419 F. Supp. 16 (N.D. Ill. 1976). (*See*, App. A at A-3.) The theoretical foundation of *Florendo* has been clearly repudiated by this Court. The *Florendo* court applied a version of the "stream of commerce" test which was decried by the Court in *Asahi Metal Ind. Co. v. Superior Court of California, Solano County*, 480 U.S. 102, 112, 107 S.Ct. 1026, 1032, 94 L.Ed.2d 92 (1987), *See also, Bond v. Octagon Press Inc.*, 745 F. Supp. 710, 713 (M.D. Ga. 1990).

the fabric of due process itself and clouds this Court's persistent efforts to provide clear guidance in this area.

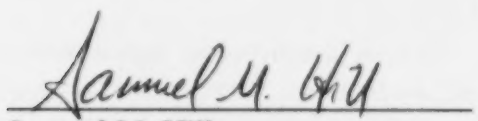
CONCLUSION

The Alabama courts have concluded that the minimum contacts test can be satisfied by a fiction — the statutorily manufactured presence of a securities sale. This fictional presence (through the "deemed" sale of the security in this state) was not based on any action of the non-resident defendant directed to the forum. In order to maintain harmony with this Court's previous jurisprudence and to prevent inconsistent standards of due process from being applied in different states, this Court should reverse the Supreme Court of Alabama's holding. The petition for a writ of certiorari raises substantial issues and should be granted.

Respectfully submitted,



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